

FEDERAL ELECTION COMMISSION

FIRST GENERAL COUNSEL'S REPORT

MUR: 7150
COMPLAINT FILED: Oct. 12, 2016
NOTIFICATION: Oct. 18, 2016
LAST RESPONSE: Nov. 8, 2016
ACTIVATED: May 11, 2017

ELECTION CYCLE: 2016
EARLIEST SOL: Oct. 7, 2021
LATEST SOL: Oct. 15, 2021

COMPLAINANT:

Edward Cox

RESPONDENTS:

New Yorkers Together and Peter Sikora in his
official capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS**

52 U.S.C. § 30101(17)
52 U.S.C. § 30102
52 U.S.C. § 30103
52 U.S.C. § 30104
52 U.S.C. § 30120(a)(3)
11 C.F.R. § 100.16
11 C.F.R. § 100.22(a) and (b)
11 C.F.R. § 109.10
11 C.F.R. § 110.11(b)(3)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint alleges that New Yorkers Together ("NYT"), a committee registered with the New York State Board of Elections, violated the Federal Election Campaign Act of 1971, as amended (the "Act") by failing to register and file disclosure reports with the Commission. According to the Complaint, NYT should have reported an October 2016 mailer to the Commission as an independent expenditure because it expressly advocated the defeat of

1 Presidential candidate Donald J. Trump.¹ Because of NYT's purported lack of disclosure, the
2 Complaint surmises that other "unknown" violations, such as the acceptance of prohibited
3 contributions or excessive contributions resulting from coordination with a federal candidate,
4 might go undetected.² NYT denies that its mailer expressly advocated the election or defeat of a
5 clearly identified federal candidate and that it was a political committee within the meaning of
6 the Act.³

7 The available information indicates that NYT's mailer did not expressly advocate the
8 defeat of then-Presidential candidate Trump under 11 C.F.R. § 100.22(a) or (b). Therefore, it
9 does not appear that NYT violated the Act or Commission regulations by failing to register and
10 report as a political committee, to report the mailer as an independent expenditure, or to include a
11 proper disclaimer on the mailer. Accordingly, we recommend that the Commission find no
12 reason to believe that New Yorkers Together and Peter Sikora in his official capacity as treasurer
13 violated 52 U.S.C. §§ 30102, 30103, 30104 and 30120(a)(3), and close the file.

14 II. FACTUAL BACKGROUND

15 NYT is registered as an Independent Expenditure Committee with the New York State
16 Board of Elections.⁴ During the 2016 general election period, NYT raised \$744,000 and spent
17 \$761,061.31 on independent expenditures opposing the election of four Republican state

¹ Compl. at 1.

² *Id.* The report does not include a discussion of these issues because the Complaint fails to present any facts indicating that the mailer was the product of coordinated activity beyond suggesting that the cost of producing and distributing the mailer benefited Democratic Presidential candidate Hillary Clinton.

³ Resp. at 1-2.

⁴ Under New York law, an Independent Expenditure Committee is a political committee that only makes independent expenditures and does not coordinate with a candidate, candidate's authorized committees, or an agent of the candidate. N.Y. Comp. Codes R. & Regs. subtit. V, tit 9, § 6200.10(b)(9).

1 candidates, including State Senator Kemp Hannon.⁵ State disclosure reports indicate that NYT
2 sponsored nine independent expenditures opposing State Senator Hannon's re-election campaign
3 during the general election period: two television ads; five mailers; one targeted digital media
4 program; and one radio ad.⁶ During the same election period, NYT sponsored one independent
5 expenditure (a mailer) in support of Hannon's Democratic opponent, Ryan Cronin.⁷

6 Sometime in October 2016, NYT distributed a two-page color mailer opposing Hannon's
7 re-election.⁸ The mailer included the following disclaimer: "Paid for by New Yorkers Together.
8 Not expressly authorized by any candidate, or by any candidate's political committee or any of
9 its agents."⁹

10 The first page of the mailer includes an image of Donald Trump and states, "THIS
11 YEAR, A WOMAN'S RIGHT TO CHOOSE FACES ITS GREATEST THREAT. . . 'THERE

⁵ See New Yorkers Together, NYS Board of Elections: 2016 Off Cycle Report, Schedule C; 2016 11 Day Pre General Report, Schedules C and F; 2016 32 Day Pre General Report, Schedule F; 2016 27 Day Post General Report, Schedules C and F. The available information indicates that NYT's 2016 electoral activities were part of an effort to change the balance of power in the Republican-controlled New York State Legislature. Jesse McKinley, *'Super PACs' Spend Freely as Control of New York Senate Hangs in the Balance*, NEW YORK TIMES, Nov. 6, 2016, https://www.nytimes.com/2016/11/07/nyregion/super-pacs-spend-freely-as-control-of-new-york-senate-hangs-in-balance.html?mcubz=1&_r=0.

⁶ See New Yorkers Together, NYS Board of Elections: 2016 Weekly/24 Hour Independent Expenditure Report; 2016 32 Day Pre General Report Summary Page and Schedule F; 2016 11 Day Pre General Report Summary Page, Schedule F; 2016 27 Day Post General Report Summary Page, Schedule F.

⁷ See New Yorkers Together, NYS Board of Elections: 2016 Weekly/24 Hour Independent Expenditure Report.

⁸ Compl., Attach. ("Mailer"). The record does not indicate the dates on which NYT distributed this mailer. The New York Board of Elections requires that independent expenditure reports include the dollar amount paid for each independent expenditure, the name of person or entity receiving the payment, the date the payment was made, a description of the expense, the election to which the expense pertains, the name of the clearly identified candidate or ballot proposal referenced, and whether that candidate is supported or opposed. N.Y. Comp. Codes R. & Regs. subtit. V, tit 9, § 6200.10(e)(1)(iii). We also do not know exactly how much the subject mailer cost to produce and distribute. State disclosure reports indicate that, between September 28, 2016 and October 7, 2016, NYT disbursed \$193,198.41 in connection with three or more mailers opposing Hannon. See New Yorkers Together, NYS Board of Elections: 2016 Weekly/24 Hour Independent Expenditure Report.

⁹ Mailer at 2.

1 HAS TO BE SOME FORM OF PUNISHMENT FOR WOMEN WHO GET ABORTIONS.’
2 KEMP HANNON SHARES TRUMP’S OUT-OF-TOUCH VALUES.” The first page of the
3 mailer ends with the instruction: “VOTE NO ON HANNON.”¹⁰

4 The second page includes an image of Hannon and states, “A WOMAN’S RIGHT TO
5 CHOOSE HAS BEEN LEGAL FOR 43 YEARS. HANNON HAS BEEN TRYING TO
6 CRIMINALIZE IT FOR 40 OF THOSE 43 YEARS. WITH TRUMP THREATENING
7 WOMEN’S HEALTH, THE STAKES ARE TOO HIGH.” The second page of the mailer also
8 contains text related to Hannon’s past votes and purported positions related to women’s
9 reproductive health and abortion. The mailer includes the following instruction at the bottom of
10 the second page: “VOTE NO ON HANNON.”¹¹

11 III. ANALYSIS

12 A. NYT’s Mailer is not an Independent Expenditure Because it Does Not 13 Contain Express Advocacy

14
15 An “independent expenditure” is an expenditure by a person expressly advocating the
16 election or defeat of a clearly identified federal candidate that is not coordinated with a
17 candidate, a candidate’s authorized committee, or their agents, or a political party committee or
18 its agents.¹² The Act and Commission regulations require political committees that make
19 independent expenditures to file reports disclosing their independent expenditures.¹³ Persons

¹⁰ *Id.* at 1.

¹¹ *Id.* at 2.

¹² 52 U.S.C. § 10101(17); 11 § C.F.R. 100.16.

¹³ *See* 52 U.S.C. § 30104(b)(4)(H)(iii) (requiring political committees other than authorized political committees to disclose all disbursements made in connection with independent expenditures).

1 who make independent expenditures aggregating more than \$250 in a calendar year must also
2 file reports of independent expenditures.¹⁴

3 Commission regulations found at 11 C.F.R. § 100.22(a) provide that a communication
4 expressly advocates the election or defeat of a clearly identified candidate¹⁵ when it uses phrases
5 such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses
6 campaign slogans or individual words, "which in context can have no other reasonable meaning
7 than to urge the election or defeat of one or more clearly identified candidate(s)"¹⁶ Under
8 11 C.F.R. § 100.22(b), a communication also constitutes express advocacy if "[w]hen taken as a
9 whole or with limited reference to external events, . . . could only be interpreted by a reasonable
10 person as containing advocacy of the election or defeat of one or more clearly identified
11 candidate(s) because — (1) [t]he electoral portion is unmistakable, unambiguous, and suggestive
12 of only one meaning; and (2) [r]easonable minds could not differ as to whether it encourages
13 actions to elect or defeat one or more clearly identified candidate(s) or encourages some other
14 kind of action."¹⁷

¹⁴ 52 U.S.C. § 30104(c)(1) (requiring every person, other than a political committee, who makes independent expenditures aggregating over \$250 during a calendar year to file reports of such expenditures); *see also* 11 C.F.R. §§ 104.4, 109.10.

¹⁵ The term "clearly identified" means "the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressman,' or the 'the incumbent,' or through an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or the Republican candidate for Senate in the State of Georgia." 11 C.F.R. § 100.17.

¹⁶ 11 C.F.R. § 100.22(a). The Commission explained that the phrases enumerated in 11 C.F.R. § 100.22(a), such as "Smith for Congress" and "Bill McKay in '94," have no other reasonable meaning than to urge the election or defeat of a clearly identified candidate. *See* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,294-35,295 (July 6, 1995). *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (a communication is express advocacy when "it provides, in effect, an explicit directive" to vote for the named candidates).

¹⁷ *See* 11 C.F.R. § 100.22(b).

1 The NYT mailer does not contain express advocacy under either 11 C.F.R. § 100.22(a)
2 or (b). Section 100.22(a) is not satisfied because NYT's mailer does not use phrases or slogans
3 that have no other reasonable meaning than to urge the defeat of Trump, a clearly identified
4 federal candidate. While the mailer clearly urges state candidate Hannon's defeat — "VOTE
5 NO ON HANNON," — it does not include similar language as to Trump.

6 Nor does the mailer contain express advocacy under Section 100.22(b) because it does
7 not contain an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only
8 one meaning" and "reasonable minds could not differ" as to whether it encourages "actions to
9 elect or defeat one or more clearly identified candidate(s) or encourages some other kind of
10 action." Even though Trump is clearly identified by name and image and is characterized in
11 unflattering terms, the mailer does not reference his status as a federal candidate, does not
12 mention the presidential election, and does not exhort the recipient to vote against Trump.¹⁸
13 Significantly, there is no exhortation for any action with regard to Trump, and the only directive
14 contained in the mailer is to vote against Hannon. Consequently, reasonable minds could differ
15 as to what NYT's inclusion of Trump's image and the quotes linking Hannon to Trump were
16 meant to convey to the recipient. For example, the mailer's inclusion of Trump's statements
17 relating to abortion and his alleged disregard for women's health can be viewed as an attempt to

¹⁸ See MUR 6122 (NAHB) (Commission found no reason to believe respondent made prohibited in-kind contribution because, on the whole, the subject mailer lacked a clear directive to take electoral action and was, therefore, not express advocacy.); MUR 5854 (Lantern Project) (Commission found no reason to believe the advertisements contained express advocacy and were expenditures because the communication's electoral portion was not "unmistakable, unambiguous, and suggestive of only one meaning;" and reasonable minds could differ regarding whether they encouraged electoral, or some other action).

1 further illustrate the dangers of a Hannon victory or an effort to amplify NYT's negative
2 message relating to Hannon's voting record on those issues.¹⁹

3 Because we conclude that NYT's mailer does not expressly advocate the election or
4 defeat of a federal candidate, it is not an independent expenditure and was not required to be
5 reported as such. In addition, while the Complaint alleges that NYT should have included a
6 disclaimer that complied with the requirements of the Act, no disclaimer was required because
7 the mailer did not contain express advocacy.²⁰ Accordingly, we recommend that the
8 Commission find no reason to believe that NYT violated 52 U.S.C. §§ 30104(c) and 30120(a)(3).

9 **B. There is No Reason to Believe that NYT was Required to Register and**
10 **Report as a Political Committee**

11 The Complaint alleges that NYT should have registered and reported as a political
12 committee by sponsoring the mailer.²¹ The Act defines a "political committee" as any
13 committee, association, or other group of persons that receives "contributions" or makes
14

¹⁹ The mailer here is similar to the communication in MUR 5468R (Moretz for Congress), where a television advertisement, paid for by the authorized committee of Moretz, attacked the qualifications of then Presidential candidate John Kerry. The Commission found no reason to believe the respondent committee violated the Act where the First General Counsel's Report concluded that the advertisement did not expressly advocate the defeat of Kerry or election of George Bush. See Commission Cert. at ¶ 1, MUR 5468R (Moretz for Congress) (Oct. 6, 2005). While the advertisement contained an electoral portion relating to candidate Moretz, its contents could be subject to several meanings besides defeat Kerry/elect Bush, including but not limited to, demonstrating Moretz's support for Bush's policies or his disagreements with Kerry's comments regarding Bush's handling of the war on terror. First Gen. Counsel's Rpt. at 9-10, MUR 5468R (Moretz for Congress).

²⁰ See 52 U.S.C. § 30120(a) (requiring disclaimers for communications expressly advocating the election or defeat of a clearly identified candidate); see also 11 C.F.R. § 110.11(b).

²¹ Compl. at 1.

1 "expenditures" which aggregate in excess of \$1,000 during a calendar year.²² An organization
2 that has crossed the statutory threshold of \$1,000, however, will not be considered a "political
3 committee" unless its "major purpose" is the nomination or election of a federal candidate."²³

4 To assess whether an organization has made an "expenditure," the Commission analyzes
5 whether spending on any organization's communications made independently of a candidate
6 constitute express advocacy under section 100.22. As discussed above, the mailer does not
7 contain express advocacy. Further, the Complaint does not allege that NYT distributed any other
8 communications which would constitute expenditures under the Act, or that it accepted any
9 contributions, and we unaware of any such information. Accordingly, the facts do not indicate
10 that NYT met the statutory threshold for political committee status under the Act. We therefore
11 recommend that the Commission find no reason to believe that NYT violated 52 U.S.C.

12 §§ 30102, 30103, and 30104, and close the file.

13 IV. RECOMMENDATIONS

- 14 1. Find no reason to believe that New Yorkers Together and Peter Sikora in his capacity as
15 treasurer violated 52 U.S.C. § 30104(c);
16
- 17 2. Find no reason to believe that New Yorkers Together and Peter Sikora in his capacity as
18 treasurer violated 52 U.S.C. § 30120(a)(3);
- 19 3. Find no reason to believe that New Yorkers Together and Peter Sikora in his capacity as
20 treasurer violated 52 U.S.C. §§ 30102, 30103, and 30104;
- 21 4. Approve the attached Factual and Legal Analysis;
- 22 5. Approve the appropriate letters; and

²² 52 U.S.C. § 30101(4)(A). The term "expenditure" is defined to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9)(A)(i). The term "contribution" is similarly defined by 52 U.S.C. § 30101(8)(A)(i).

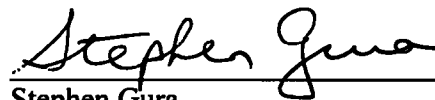
²³ See *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007).

6. Close the file.

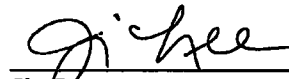
Lisa J. Stevenson
Acting General Counsel

Kathleen M. Guith
Associate General Counsel for Enforcement

8.8.17
Date



Stephen Gura
Deputy Associate General Counsel for Enforcement



Jin Lee
Acting Assistant General Counsel



Marianne Abely
Attorney